Supreme Court, U.S.
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No. 00-659

IN THE

Supreme Court of the United States

AFFILIATED FM INSURANCE CO.,

Petitioner,

v.

CHEMICAL BANK, EUROPEAN AMERICAN BANK, BANQUE PARIBAS, AMERICAN EXPRESS BANK LTD., NATWEST BANK N.A., RABOBANK NEDERLAND, ANDINA COFFEE INC., and ANDINA TRADING CORP.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Petitioner Affiliated contends that because the court below initially focused on what it believed was a single dispositive issue requiring judgment for Affiliated (the "policy cancellation" issue), it inexplicably failed — when it did grant rehearing and partially reverse itself on cancellation — to go back and address and decide *any* of the seven equally substantial issues originally raised by Affiliated and extensively briefed by both sides. The petition explains why this failure violates Affiliated's right to appeal, sound appellate practice, due process and fundamental fairness, and conflicts with decisions of this Court and other federal circuit courts.

Respondents' Opposition fails entirely to meet the heart of Affiliated's argument — that the court below never reached, addressed, decided or adjudicated any of the seven substantial issues — although some provide a full defense to the judgment now reduced to $64 million, while others provide partial defenses each worth many millions of dollars.

Instead, respondents simply speculate (given the absence of any objective indication) that the court did somehow consider and decide all issues raised. Based on that speculation, they primarily advance three "arguments": (1) that appellate courts are not obligated to issue full written opinions disposing of each and every issue raised by a party; (2) that appellate courts may summarily dispose of particular issues and entire appeals; and (3) that Affiliated allegedly failed to warn the court below that failure to adjudicate the "undecided issues" would violate its right to appeal, sound appellate practice, due process and fundamental fairness.[1] As we show below, these arguments

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1. Lacking any objective proof that the court did consider and decide all issues raised, respondents also suggest (Opposition, p. 16) that the court's practice in this case is somehow protected by a "presumption of regularity." That "presumption" is not applied to insulate judicial decisions from review by this Court. Rather, as (Cont'd)

neither fairly address the issues raised in the petition nor fairly portray what happened in the court below. Still less do they weigh persuasively against Affiliated's petition that this Court grant the writ.

A. That appellate courts are not obligated to address at length issues they regard as "frivolous or totally without merit" does not explain or justify what was done here

Affiliated does not argue that federal appellate courts must always address at length every insubstantial issue raised by a party. Appellants and appellees do sometimes raise issues which are "frivolous" or "totally with merit." And courts not infrequently dispose of such insubstantial issues with familiar phrases like "The remaining issues raised by appellant are without merit," or "do not require discussion." But that's not what happened here.

First, the court below pointedly omitted either to consider and decide or to say *anything* regarding the merits of the seven issues.[2] Neither its February 25, 1999 decision reversing the

(Cont'd)
demonstrated by the very cases they cite, the "presumption" is applied to the conduct of members of the executive branch, and is a function of the "separation of powers" doctrine. For example, it was applied in *Strickler v. Greene*, 527 U.S. 263, 286 (1999), to sustain the conduct of a prosecutor, and in *United States v. Chemical Foundation*, 272 U.S. 1, 14-15 (1926), to conduct of the Alien Property Custodian acting at the direction of the President.

Regrettably, respondents also seek to besmirch Affiliated and its counsel by dredging up unwarranted attacks respondents had made on their pre-trial conduct — without disclosing to this Court that those same attacks were the subject of an unsuccessful pretrial motion (whose rejection was never appealed), and again raised after trial based on extra-record evidence to which Affiliated was not permitted to respond.

2. The court's only reference to these issues was in its original decision vacating the judgment in its entirety, where it opened its
(Cont'd)

$93 million judgment against Affiliated on the ground that cancellation was complete, nor its November 8, 1999 rehearing decision which reinstated over $60 million of the award on the ground that cancellation was only partial, nor its July 24, 2000 order summarily denying Affiliated's petition for rehearing, so much as mentioned the seven "undecided" issues, either collectively or individually. Accordingly, the tradition of using short "catchwords" to express a court's dismissal of an issue as frivolous or without merit has no application here.

Second, the seven issues left "undecided" in this case were not "insubstantial" issues fairly susceptible to disposition by "catchword." Affiliated's original appellate brief devoted 15 pages to the two-part cancellation issue, but twice that number — at least 30 pages — to the other seven issues. Affiliated's reply brief spent 6 pages on cancellation, but 18 pages — or three times that number — on the other seven issues. Even the appellees devoted just 10 pages of their brief to cancellation, compared to 30 pages to the other seven.

As *amicus curiae*, the American Insurance Association expressly supported Affiliated's position on three issues: (1) that both cancellations were effective; (2) that no coverage for losses from "fraudulent bills of lading" exists where bank plaintiffs close their eyes to "red flags" necessarily raised by future-dated draw documents; and (3) that Affiliated's standard clauses limiting liability and capping "accumulation of interests" — to $8 and $16 million, respectively — should not be "brushed aside" by reading them out of the policy or by insisting they be applied to each individual draw document. The *amicus* stressed

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"discussion" of the case with these perfectly neutral words: "Affiliated makes several claims of error on appeal, but the dispositive issue is whether the Banks are bound by [the two cancellation events]." Petition, at 17a. Nothing in that sentence implies any view of the merits of the "several claims of error." And since the court ruled in Affiliated's favor on the basis of cancellation, it had no occasion to reach or decide any of its other defenses.

the "vital importance" to the insurance industry that the appellate court reverse the district court's erroneous rulings on at least these three commercially significant issues.

B. That courts may, in special circumstances, dispose of certain cases without opinion does not support the Court of Appeals' right to avoid deciding substantial issues without a word of explanation

Respondents argue (Opposition, p. 18) that it matters not "Whether an appellate court simply affirms without opinion, affirms on the opinion below, or mentions only the significant issues. . . ." They could not be more wrong.

First, affirming "on the opinion below" means that the appellate court has adopted a lower court's opinion as its own. The Second Circuit often adopted opinions by judges like Learned Hand or Edward Weinfeld. In such cases, one could read the adopted opinion to learn precisely what was decided, as well as the reasons for the decision. But that did not happen in this case. Nor could it, for the court below reversed Judge Pollack on the cancellation issue, concluding that he had failed to apply the applicable law and had made a crucial fact-finding that was "clearly erroneous." And it must have noticed that his 50-page opinion, disposing of almost a dozen legal issues, cites not a single legal authority.

Second, respondents assert the alleged right of federal appellate courts to affirm without an opinion. They point, *first*, to Rule 36 of the Federal Rules of Appellate Procedure. That rule — 36(a)(2) — addresses the technical question of how judgments are entered, and refers without explanation to entry "if a judgment is entered without an opinion." Nothing in that rule, or in any other cited by respondents, authorizes a court of appeals to decide a substantial case without making clear what issues have been considered and decided. They point, *second*, to Rule 0.23 of the Second Circuit's own rules. That rule authorizes a panel to dispose of a case "in open court or by

summary order" where the panel is unanimous and each member "believes that no jurisdictional purpose would be served by a written opinion," and provides procedures for doing so. No such procedures were followed here. *Third,* they point to this Court's own Rule 18.12, dealing with direct appeals from district courts. But that rule contemplates summary disposition only where the Court determines not to set a case for briefing or argument on the merits — not afterward. None of these rules relieves an appellate court of its fundamental obligation to disclose which issues have been considered and decided, and how they have been decided. Significantly, respondents cite not a single instance where a federal court of appeals has ordered entry of judgment in a large case — in this instance, awarding more than $60 million to plaintiffs and bristling with important legal issues attracting the attention of the American insurance industry — without a written opinion.

Respondents get no support from the decisions they cite from this Court. (Opposition, p. 18) Indeed, those cases are fatal to their position. In both *Sumner v. Mata,* 449 U.S. 539 (1981), and *Taylor v. McKeithen,* 407 U.S. 191 (1972), this Court *reversed* federal appellate courts for making summary dispositions without explaining how they had treated certain issues. That practice left this Court unable to review what they had done, and with no "insight" into their thinking. *Taylor* is especially relevant. There, the Fifth Circuit reversed without opinion the district court's decision adopting a legislative reapportionment plan for New Orleans. When the original plaintiffs petitioned for certiorari, this Court granted the writ, vacated and remanded to the Court of Appeals for elaboration of its decision, without waiting for briefing and oral argument. In *Sumner,* this Court reversed the Ninth Circuit for rejecting a Section 2255 petition, in the face of contrary conclusions by a state appellate court and a federal district judge, without offering an adequate written explanation to show just what factors it had, or had not, considered.

Third, respondents assert the right of federal appellate courts to discuss important issues, while simply ignoring others. Again, none of the cases they cite support their position. (Opposition, pp. 17-19) For example, in *United States v. Garza,* 165 F.3d 312 (5th Cir. 1999), defendant sought a "certificate of appealability" under 28 U.S.C. § 2253(c)(1)(B) entitling him to review of a district court's denial of his Section 2255 motion to vacate a death sentence. One contention was that, on his original appeal from the conviction, the same appellate court had overlooked or failed to address his challenge to certain "aggravating factors" evidence, while dealing at exhaustive length with other evidentiary issues. The court said that a "litigant's right to have all issues fully considered and ruled on by the appellate court does not equate to a right to a full written opinion on every issue raised." 165 F.3d at 315. But it found it necessary to add that, although it had not discussed the issue explicitly in its earlier opinion, "the issue nevertheless received full consideration and a ruling," and that its statements in the original opinion that it found "no reversible error" and that defendant had "shown no error" were broad enough to encompass the specific claims of error. By contrast, in our case, although twice asked to do so (in our opposition to plaintiffs' petition for rehearing, and in our petition for rehearing), the Second Circuit has never stated that it ever considered or decided the seven "undecided" issues, nor has it ever asserted that those issues were "without merit."[3]

3. Each of the other cases cited by respondents also contained what the decisions in our case did not — explicit representations that all the issues had been considered and decided. In *Furman v. United States,* 720 F.2d 263 (2d Cir. 1983), the opinion constituting the "summary affirmance" was five pages long and discussed eleven separate issues raised by Furman. In *United States v. Patel,* 879 F.2d 292 (7th Cir. 1989), the appellate court expressly stated that only one of the issues raised "merits discussion," and in denying rehearing, the court expressly stated that it had considered all the issues raised by Patel, had now reconsidered them, and was "satisfied that the remaining issues indeed lack merit and do not require discussion." 879 F.2d at

(Cont'd)

C. Respondents' assertion that Affiliated failed to raise the procedural issue it now presses is simply untrue

It is not always possible or necessary for a petitioner to raise in the appellate court an objection arising out of the manner in which the appellate court decided the appeal. But in this case, it is clear that Affiliated *did* raise with the court below that failure to reach and decide the seven issues left "undecided" when the court temporarily focused on the cancellation issue would deprive Affiliated of basic rights. After listing the "undecided issues," Affiliated cautioned the panel, at page 9 of its rehearing petition, that:

> Some of these substantial issues provide a complete defense to plaintiffs' claims; others, only a partial defense. *In any event, they cannot in fairness, as a matter of due process, and consistent with sound appellate court procedure, be allowed to slip through the cracks undecided* just because the panel originally concluded, correctly we think, that this appeal could be disposed of on the basis of the December agreement canceling Affiliated's coverage as of February 25 and the April agreement replacing Affiliated with the London insurers on pre-February 25 interior risk. (Emphasis supplied)
>
> If the panel does not grant rehearing and reinstate the original decision, nor decide the other

(Cont'd)

295. In *United States v. Jones*, 763 F.2d 518, 520 (2d Cir. 1985), the court affirmatively stated that "Appellants raise a number of claims, only two of which require discussion." In *Kairys v. I.N.S.*, 981 F.2d 937 (7th Cir. 1992), the court found that the thumbprint issue raised on the second appeal had in fact been discussed on the first appeal, although not necessarily in the words the party would have preferred. And in *Mainiero v. Jordan*, 105 F.3d 316 (7th Cir. 1997), the issue which petitioner alleged had not been decided in his state court appeal had in fact been addressed and decided by the intermediate appellate court. *State v. Maniero*, 525 N.W.2d 304, 306, 309-12, 314 (Wis. Ct. App. 1994).

> substantial issues raised on this appeal, Affiliated suggests en banc consideration. We set out below the reasons why at least several of these undecided issues are themselves of exceptional importance, and why any appellate procedure which would allow such substantial issues to go undecided is of exceptional importance requiring en banc review. (Footnote omitted)

Once again, the cases cited by respondents (Opposition, p. 25) fail to support their position. *Auer v. Robbins*, 519 U.S. 452, 464 (1997), held that the argument raised by the policemen plaintiffs could not be made in their lawsuit, but had to be raised first by petition to the Secretary of Labor for an amendment to the "disciplinary deduction" rule. In *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970), petitioner sought to raise in this Court an issue it had presented to the district court but failed to raise on appeal. And the Court dismissed the writ as improvidently granted in *Adams v. Robertson*, 520 U.S. 83 (1997), when it appeared that, with respect to a ruling by a state trial court, petitioner had failed to define or present a federal question on its appeal to the state supreme court, from which it now sought Supreme Court review. None of those cases bear on this one, where Affiliated seeks review of the manner in which the appellate court itself decided the case.

* * *

The fact is that the court below left in place a judgment against Affiliated exceeding $60 million, without ever considering or deciding seven substantial issues, including issues of "vital importance" to the American insurance industry, which provide Affiliated with complete or partial defenses. The district court's 50-page opinion, awarding $93 million to the plaintiffs, addressed or raised most of those issues — without citing a single legal authority. And it remains discredited — held by the appellate court to have been wrong on the law (at least as to policy cancellation) and "clearly erroneous" as to

a key fact finding. No one — except for respondents who point to no objective indicia to support their speculation — believes the court below actually decided any of the "undecided" issues.

Consider, for example, Affiliated's contentions — based on solid precedent — that the federal maritime jurisdiction applied because all the Colombian coffee covered by its policy was always intended to be shipped by sea to New York, that the maritime jurisdiction brought into play the federal "uberrimae fidei" or "utmost fidelity" test, and that plaintiffs flunked this test when they failed to inform Affiliated that they had allowed payment on future-dated draw documents, or that they suspected Andina's complicity in the fraud conducted by some of its own senior officers and by its corporate parent. Judge Pollack rejected all these claims, despite overwhelming precedent to the contrary. Nevertheless, his Southern District colleagues continue to follow the pre-*Chemical Bank* precedents cited by Affiliated — contrary to the respondents' notion that the appellate court necessarily affirmed Judge Pollack on all those issues. A striking recent example is Judge Koeltl's decision in *Lionel Thomas v. NASL Corp.*, 2000 U.S. Dist. LEXIS 16761 (S.D.N.Y. November 20, 2000), reported in the *New York Law Journal* for November 28, 2000, and reproduced as an addendum to this reply. Judge Koeltl accepted and applied the very rules on federal maritime jurisdiction and *uberrimae fidei* which Judge Pollack rejected, which Affiliated pressed upon the court below, but which respondents now assert that court must necessarily have rejected. If the appellate court is deemed somehow to have implicitly affirmed Judge Pollack on these issues and rejected Affiliated's positions, that remains a well-kept secret, not cognizable by district judges sitting in the Second Circuit, or litigators practicing there.

D. Respondents have impaled themselves on the horns of a dilemma

What the court below did here — focusing exclusively on a single issue which initially seemed dispositive but later proved

only partially so, while declining to go back and address other substantial issues of "vital importance" to a major industry — cannot be allowed to stand. For one thing, it deprives Affiliated of its right to appeal, to sound appellate practice, to due process, and to fundamental fairness. For another, it leaves in doubt the state of the law in the Nation's commercial heartland. Can this Court really tolerate the situation where a thoughtful federal trial judge like John Koeltl must now read tea leaves or the brief filed by the present respondents back in 1998 in order to divine Second Circuit law on federal maritime jurisdiction and the *uberrimae fidei* doctrine — while his colleagues in New York, Connecticut and Vermont must do the same in order to divine Second Circuit law on limitation-of-liability clauses in insurance policies, whether future-dated draw documents can be deemed legitimate "bills of lading, and when date-of-loss is deemed to occur in marine cargo insurance policies?

Respondents have impaled themselves on the horns of a dilemma: If they are correct and the court below did silently affirm Judge Pollack's rejection of all seven of Affiliated's defenses, then no district judge sitting in the Second Circuit, no Second Circuit judge who did not sit on the *Affiliated* panel, and no litigator practicing in the Second Circuit can determine the Circuit's law on these seven important subjects. If respondents are wrong and the court below did fail to consider and decide these seven substantial issues, then Affiliated must pay a $64 million judgment, without regard to the merits of the seven substantial defenses it timely raised and fully briefed on appeal. Neither alternative is acceptable — as a matter of sound appellate practice, Affiliated's right to appeal, due process, and fundamental fairness.

CONCLUSION

The Court should grant the writ to review the lower court's failure to consider and decide the substantial issues presented by the present case, then reverse the judgment below and remand with instructions to adjudicate those issues.

Respectfully submitted,

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APPENDIX

APPENDIX — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK RE *LIONEL THOMAS v. NASL CORP.*, NEW YORK LAW JOURNAL, NOVEMBER 28, 2000

LIONEL THOMAS

v.

NASL CORP.

New York Law Journal
November 28, 2000

SOUTHERN DISTRICT

Judge Koeltl

LIONEL THOMAS v. NASL CORP. QDS:02763211 The plaintiff, Stephen Lionel Thomas ("Thomas") has filed this declaratory judgment action pursuant to 28 U.S.C. §2201 and common law doctrines of fraud against NASL Corp. ("NASL"), Bowman Import/Export Ltd. ("Bowman"), Joy-Lud Distributors International, Inc. ("Joy-Lud"), F.J. Elsner & Co. ("F.J. Elsner"), and Bekington S.A. ("Bekington"), seeking a declaration that marine cargo insurance policies M829460 and L929460 ("the policies") are null and void and should be rescinded. The plaintiff's action is founded on an allegation that NASL violated the duty of utmost good faith, which governs marine insurance contracts under federal admiralty and New York state law, by failing to disclose material facts about its financial status. The plaintiff sues on his own behalf and on the behalf of certain other Lloyd's Underwriters subscribing to the policies

(collectively "Lloyd's"). Jurisdiction is asserted under 28 U.S.C. §1333(1) because the matter in controversy allegedly relates to rights and obligations that affect maritime commerce, particularly the formation of marine cargo insurance policies.

NASL, Bowman, Joy-Lud, and F.J. Elsner now move to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim and Fed. R. Civ. P. 9(b) for failure to plead fraud with sufficient particularity.[1] They also contend that the complaint does not meet the requirements of Fed. R. Civ. P. 10(b), which requires separate claims in separate counts, and they move to strike certain allegations in the complaint pursuant to Fed. R. Civ. P. 12(f).

I.

The following allegations in the complaint are accepted as true solely for purposes of this motion. NASL is a company that purchases frozen food products such as poultry from United States suppliers and receives a fee for transporting those products by sea to Eastern Europe and the former Soviet Union for distribution and sale. (Compl. ¶¶15-16.) In some instances, NASL would pay the producer directly or through a financier before shipping the cargo. In others, NASL would promise to pay the producer when the cargo reached its destination and was sold. (Compl. ¶16.)

In the spring of 1998, NASL approached Lloyd's through brokers about obtaining a marine cargo insurance policy to

1. Bekington has filed an answer and counterclaim and is not a party to any of the present motions.

cover the risk of loss or damage to its food products. (Compl. ¶17.) NASL wanted certain insurance terms that its prior insurers did not provide, such as coverage for the financiers who funded NASL's cargo purchases and an endorsement that would require the insurer to pay the financiers if NASL was guilty of infidelity or conversion. (Id.) Relying on positive statements by NASL's brokers concerning NASL's business history and minimal losses under prior policies, Lloyd's issued policy M829460 for the period from June 8, 1998 to June 7, 1999. The policy provided NASL with "all risks" coverage to NASL as well as coverage for shipments "for the account of others" that NASL is instructed to insure. The policy covered NASL's products from warehouse to warehouse and required an additional premium for time the products spent in cold storage greater than thirty days. (Compl. ¶19.) The policy also contained a New York choice of law clause. (Id.)

In June of 1998, NASL again approached Lloyd's through its brokers, this time seeking to obtain additional "financiers endorsements" relating to its policy for its private financiers. (Compl. ¶20.) NASL did not reveal its reasons for seeking such a policy, but Lloyd's alleges that NASL was motivated by its poor financial condition. (Compl. ¶20.) Lloyd's believes that NASL's financiers requested such endorsements so they would be guaranteed payment if NASL defaulted. (Compl. ¶21.) The endorsements were issued and gave four financiers, F.J. Elsner, Bowman, Bekington, and Joy-Lud (the "Financiers"), the status of additional insureds. (Compl. ¶¶22-23.) The Endorsements provided:

> This insurance, as to the interest of the financier shall not be impaired nor invalidated by any act

> or neglect of the named insured nor by failure to comply with warranty or condition over which the Financier has no control and this policy shall not be canceled nor materially changed as to the interest of the Financier unless ten (10) days written notice of such change or cancellation shall have been given to the Financier except with respect to war, strikes, riots and civil commotions which are subject to cancellation upon forty eight (48) hours notice.

(Compl. ¶22.)

During the first year of its policy, although it paid its premium late, neither NASL nor its financiers submitted any claims. (Compl. ¶24.) In the spring of 1999, NASL applied for renewal of its policy, disclosing only information of its "exceptional loss ratio" and emergence as one of the "premier frozen poultry traders for the future." (Compl. ¶25.) Based on these disclosures, Lloyd's issued policy L929460, which had terms substantially similar to the first policy, for the term June 8, 1999 to June 7, 2000. (Compl. ¶26.)

In July 1999, the Financiers submitted numerous claims to Lloyd's that to date total about $38 million. (Compl. ¶27.) According to Lloyd's, the claims detail that NASL stole approximately 64,000 metric tons of cargo from its transit vessels or warehouses and failed to repay the Financiers money it owes. (Compl. ¶28.) Lloyd's alleges that the Financiers reported that NASL and its Eastern European agent used fraudulent bills of lading, out-turn documents, warehouse receipts, and United States Department of

Appendix

Agriculture certificates to release the cargo without knowledge of its Financiers. (Compl. ¶29.)

After the claims were submitted, Lloyd's conducted an investigation into the claims as well as the validity of the assertions NASL made to obtain coverage initially. (Compl. ¶30.) In the course of the investigation, Lloyd's found the following facts: (1) in or about 1995, NASL was forced to seek outside funding as a result of financial strain caused by the confiscation of its train cars by Russian authorities for NASL's failure to pay required fees; (2) starting in 1995, numerous distributors and producers became reluctant to deal with NASL because of its lack of creditworthiness; (3) a major United States producer of frozen foods stopped selling to NASL in 1997 because of its poor credit reputation; (4) on at least three occasions, NASL loaded frozen food without making payment although payment was to be made before the shipments were loaded; (5) NASL frozen foods were seized by Estonian authorities as compensation for a producer that NASL had failed to pay; (6) NASL was involved in United States lawsuits for overdue payments to producers; (7) others in the shipping business believed that NASL had forged documents relating to the transport of food shipments; and (8) by the spring of 1999, NASL had diverted shipments of frozen food products and failed to repay the Financiers for certain of those products. (Compl. ¶31.)

Lloyd's claims that it could not have discovered these facts because of NASL's portrayal of itself as a successful company. (Compl. ¶32.) On December 9, 1999, Lloyd's tendered return of the premiums it had collected from NASL, together with interest, in the total amount of $73,070.40.

(Compl. ¶33.) Lloyd's now seeks to rescind the policies at issue.

II.

The defendants move to dismiss on two grounds. First, NASL and the Financiers argue that the complaint should be dismissed and no declaration issued rescinding the policies because NASL was not obligated to disclose information about which Lloyd's did not inquire.[2] Second, the Financiers argue that even if a claim has been stated to rescind the policies with respect to NASL, Lloyd's obligations to them continue to exist and therefore the complaint should still be dismissed against the Financiers.

On a motion to dismiss, the allegations in the complaint are accepted as true, see Cohen v. Koenig, 25 F.3d 1168, 1172-73 (2d Cir. 1994), although a court may consider certain materials outside the pleadings which are integral to the allegations. See Paulemon v. Tobin, 30 F.3d 307, 308-09 (2d Cir. 1994); Allen v. Westpoint-Pepperell, Inc., 945 F.2d 40, 44 (2d Cir. 1991). In deciding a motion to dismiss, all reasonable inferences must be drawn in the plaintiff's favor. See Gant v. Wallingford Bd. of Educ., 69 F.3d 669, 673 (2d Cir. 1995); Cosmas v. Hasset, 886 F.2d 8, 11 (2d Cir. 1989). The court's function on a motion to dismiss is "not to weigh the evidence that might be presented at trial but merely to determine whether the complaint itself is legally sufficient." Goldman v. Belden, 754 F.2d 1059, 1067 (2d Cir. 1985).

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2. While Bekington is also a Financier, it is not a party to this motion.

Therefore, a defendant's motion should only be granted if it appears that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Valmonte v. Bane, 18 F.3d 992, 998 (2d Cir. 1994); see also Goldman, 754 F.2d at 1065.

For the reasons explained below, the plaintiff has stated a claim against NASL but not against the Financiers.

III.

The gist of the plaintiff's claims is that NASL failed to disclose facts material to the risk being insured and that this failure to disclose those risks violated the obligation of an insured to exercise utmost good faith, or uberrimae fidei, to the insurer. The first claim for relief is asserted under the English Marine Insurance Law and the second claim for relief is asserted under New York state law. However, in its papers and at argument, the plaintiff relied on federal admiralty law as the substantive law to be applied to the issue of whether the plaintiff has established a claim based on the alleged failure by NASL to disclose material risks. (See Tr. of October 18, 2000 Hearing at 29-33.) The defendants argue that New York law is the law to be applied and did not require NASL to volunteer all material facts about the risk to the insurer. There is no conflict between federal admiralty law and New York law on this issue because under both, the doctrine of utmost good faith applies to marine risks. Furthermore, at this stage of the proceedings, the plaintiff has sufficiently alleged the failure to disclose material facts with respect to the insurance for marine risks.

Appendix

A.

This Court has jurisdiction over this case pursuant to its federal admiralty jurisdiction. See 28 U.S.C. §1333(1). It is well established that federal admiralty jurisdiction extends to cases involving marine insurance contracts. See Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 313 (1955); Advani Enterprises v. Underwriters at Lloyd's, 140 F.3d 157, 161 (2d Cir. 1998); Hartford Fire Ins. Co. v. Mitlof, 193 F.R.D. 154, 157 (S.D.N.Y. 2000). While a contract containing both marine and non-marine elements will generally not be a basis for admiralty jurisdiction, see Hartford Ins. Co. v. Orient Overseas Containers Lines (UK), Ltd., No. 99-9502, 2000 WL 1608720, at *3 (2d Cir. Oct. 27, 2000), a claim under the marine portion of the contract will sustain jurisdiction where the marine elements are separable. See Atlantic Mut. Ins. Co. v. Balfour Maclaine Inter. Ltd., 968 F.2d 196, 199 (2d Cir. 1992). There is also maritime jurisdiction where the non-marine elements are merely "incidental" in an otherwise maritime contract. See id. Where an insurance policy contains both maritime and non-maritime obligations, a "federal court must initially determine whether the subject matter of the dispute is so attenuated from the business of maritime commerce that it does not implicate the concerns underlying admiralty and maritime jurisdiction." Id. at 200. In this case, all parties agree that the Court has subject matter jurisdiction because the plaintiff seeks a declaration that two insurance policies covering the overseas shipment and storage of marine cargo are void and should be rescinded. While the Court has an independent obligation to assure that it has subject matter jurisdiction, the plaintiff has alleged sufficient facts

concerning the predominant maritime nature of the policies and the incidental non-maritime aspects to sustain jurisdiction at this point. See Youell v. Exxon Corp., 48 F.3d 105, 109 (2d Cir. 1995), vacated on other grounds, 516 U.S. 801 (1995); Royal Ins. Co. v. Sportswear Group, 85 F. Supp.2d 275, 278 (S.D.N.Y. 2000).

B.

Because this case falls within this Court's federal admiralty jurisdiction, this Court must apply federal admiralty law to an issue if there is a federal admiralty rule relevant to resolving that issue. See Yamaha Motor Corp. v. Calhoun, 516 U.S. 199, 206 (1996); Wilburn, 348 U.S. at 314-15; Youell, 48 F.3d at 110.

Because Congress has not legislated with regard to marine insurance, "marine insurance policies are governed by state insurance regulations, unless the federal courts have fashioned an admiralty rule on point, or unless a need for such a federal rule exists." Youell, 48 F.3d at 110. The doctrine of utmost good faith is in fact a well established federal admiralty rule that governs the formation of marine insurance contracts and must be applied in this case. See Knight v. U.S. Fire Ins. Co., 804 F.2d 9, 13 (2d Cir. 1986); Commercial Union Ins. Co. v. Flagship Marine Services, Inc., 982 F. Supp. 310, 313 (S.D.N.Y. 1997); Thebes Shipping, Inc. v. Assicurazioni Ausonia Spa, 599 F. Supp. 405, 426-27 (S.D.N.Y. 1984). The rule requires the party applying for insurance to "disclose all circumstances known to him which materially affect the risk." Puritan Ins. Co. v. Eagle Steamship Co., 779 F.2d 866, 870 (2d Cir.

1985). If the insured acquires material information after having applied for insurance, the insured is required to communicate that information. See id.; Commercial Union Ins. Co., 982 F. Supp. at 313; Thebes Shipping, Inc., 599 F. Supp. at 426. If the insured fails to disclose a material fact that the insurer relied upon in approving coverage, then the policy is void. See Puritan Ins. Co., 779 F.2d at 871; Commercial Union Ins. Co., 982 F. Supp. at 313; Thebes Shipping, Inc., 599 F. Supp. at 426.

The defendants argue that the doctrine of utmost good faith does not apply to this case because the claims submitted by the Financiers involved losses associated with the storage of produce in warehouses rather than losses at sea. They cite In re Balfour MacLaine Inter., Ltd., 85 F.3d 68 (2d Cir. 1996) for the proposition that the doctrine of utmost good faith does not apply to warehouse storage clauses if the provision can be severed and considered a separate "inland" risk. As the defendants point out, as in Balfour, the plaintiff's insurance policy has separate provisions for transit and warehouse coverage.

Balfour does not support granting the motion to dismiss in this case. In Balfour, an insurer sought a declaratory judgment that it was not required to pay certain claims under an open cargo marine policy that related to alleged losses of coffee from Mexican warehouses. After a full trial and a judgment for the insured, the Court of Appeals found that there was no admiralty jurisdiction over the declaratory judgment action for non-coverage because the connection between the missing coffee and admiralty jurisdiction was "simply too speculative and attenuated to justify admiralty

. . . jurisdiction" given the fact that the coffee was designated for transport by truck or rail from Mexico to Texas and the missing coffee never became marine cargo. See Id. at 75. The Court of Appeals reasoned that there was no admiralty jurisdiction over a claim that sought to void the entire insurance contract because the contract included maritime and non-maritime elements and thus there was no basis for admiralty jurisdiction unless the maritime aspects were separable or the non-maritime elements of the policy were incidental to an otherwise maritime contract. Moreover, the court was required to consider whether an issue related to maritime interests had been raised. However, the Court of Appeals found that the nature of the underlying transaction being insured coffee in Mexican warehouses had no connection with maritime commerce. Moreover, the non-maritime obligation that was at issue was not "incidental" to the policy as a whole; "[i]t required a separate premium and separate declarations, and account[ed] for a considerable volume of coffee insured under the policy." Id.

In this case, the fact specific findings that allowed the Court of Appeals in Balfour to conclude that there was no admiralty jurisdiction cannot be made on this motion to dismiss. Indeed, all parties concede that there is admiralty jurisdiction based on the extensive connection with maritime commerce for the policies at issue in this case, which insured the ocean shipment of poultry. The plaintiff asserts that the marine aspect of the policies was central to the policies and that the policies had only incidental warehouse coverage aspects. (Tr. of Oct. 18, 2000 Hearing at 40-41.) Moreover, the complaint alleges that there were extensive thefts from transit vessels or from warehouses. (Compl. ¶28.) The plaintiff

asserts that discovery will establish the central marine aspect of the subject matter of this dispute. Balfour does not foreclose the application of the doctrine of utmost good faith in this case.

The plaintiff has pleaded sufficient facts to survive a motion to dismiss his federal admiralty claim that NASL violated its duty of utmost good faith. He alleges that NASL violated its duty by failing to disclose numerous material facts, such as information about its financial stability. See, e.g., Employers Ins. of Wausau v. Triton Lines, Inc., No. 88 Civ. 5276, 1991 WL 190592, at *3 (S.D.N.Y. Sept. 18, 1991) (holding that failure to disclose prior loss history violates doctrine of utmost good faith). The plaintiff claims that if he had known these facts he would not have issued marine insurance to NASL. While the defendants argue that the undisclosed facts were immaterial, materiality is a question of fact that cannot be decided on this motion to dismiss. See Christiania Gen. Ins. Corp. v. Great American Ins. Co., 979 F.2d 268, 278 (2d Cir. 1992).

C.

The defendants fare no better in their motion to dismiss the second claim, which purports to be pleaded under New York law. New York applies federal maritime law to maritime cases. See Sundance Cruises Corp. v. American Bureau of Shipping, 7 F.3d 1077, 1080 (2d Cir. 1993).

Hence, under New York law, the doctrine of utmost good faith applies to the "marine" elements of a contract. See Balfour, 85 F.3d at 81 (citing Stecker v. American Home Fire Assur. Co., 84 N.E.2d 797, 798 (N.Y. 1949)); Scarburgh

Co. v. American Manuf. Mut. Ins. Co., 435 N.Y.S.2d 997, 1000-01 (Sup. Ct. 1979), aff'd, 439 N.Y.S.2d 298 (App. Div. 1981). It does not apply to in-land risks that are severable from the marine elements of the contract, which in turn depends on issues such as whether the inland risk is integrated with the remainder of the marine policy in terms of valuation, exclusions, and termination. See Balfour, 85 F.3d at 81 (citing Mur-Joe Distribs., Inc. v. Reliance Ins. Co., 1989 A.M.C. 2015, 2020 (Sup. Ct. 1989); Ebisons Harounian Imports, Inc. v. Travelers Indemnity Co., 1993 A.M.C. 1149, 1150-51 (Sup. Ct. 1992), rev'd on other grounds, 600 N.Y.S.2d 242 (App. Div. 1993)). The plaintiff seeks to rescind marine insurance policies, which clearly have substantial marine elements. It cannot be determined on this motion to dismiss whether there are non-marine elements of the policies that are severable.

D.

The defendants also move to dismiss the plaintiff's claims on the grounds that the plaintiff has failed to detail with sufficient particularity the alleged violations of the insured's duty of utmost good faith. In a case claiming such an alleged fraudulent omission, to satisfy Fed. R. Civ. P. 9(b), the plaintiff must "(1) detail the statements (or omissions) that the plaintiff contends are fraudulent, (2) identify the speaker, (3) state where and when the statements (or omissions) were made, and (4) explain why the statements (or omissions) are fraudulent." Harsco Corp. v. Segui, 91 F.3d 337, 347 (2d Cir. 1996); accord Weaver v. Chrysler Corp., 172 F.R.D. 96, 101 (S.D.N.Y. 1997). The plaintiff has detailed the specific omissions in his complaint, attributed these

omissions to NASL, outlined how the omissions were made in the context of applying for the marine insurance, and explained with particularity how the omissions allowed NASL to represent itself as a financially sound company when it allegedly was not. The plaintiff has therefore alleged fraudulent omissions with sufficient particularity to satisfy Fed. R. Civ. P. 9(b).

The defendants, therefore, have failed to establish that the plaintiff's claims of failure to disclose material information relating to the risks insured should be dismissed either because they do not state a claim under Fed. R. Civ. P. 12(b)(6) or because they are pleaded with insufficient particularity under Fed. R. Civ. P. 9(b).

IV.

The Financiers argue that even if the policies are void with respect to NASL, Lloyd's cannot rescind the Financiers' coverage without an allegation of wrongdoing on the part of the Financiers. The Complaint alleges wrongdoing by the insured NASL in failing to disclose material facts relating to the risks insured, but it makes no such allegations against the Financiers. See Complaint at ¶¶2, 38-41, 49-52; Tr. of October 18, 2000 Hearing at 33-34. The plaintiff counters that if the policies are void with respect to NASL, Lloyd's owes no obligation to the Financiers. The Financiers are correct because under New York law, they have an independent contractual relationship with Lloyd's that is unaffected by any rescission of Lloyd's obligations to NASL.

Appendix

A.

There is no established federal admiralty rule that governs the construction of maritime insurance contracts. See Commercial Union Ins. Co. v. Flagship Marine Services, Inc., 190 F.3d 26, 30 (2d Cir. 1999). Federal courts apply state law when there is no admiralty rule on point. See Wilburn, 348 U.S. at 314-16; Youell, 48 F.3d at 110. As the Second Circuit Court of Appeals has noted: "[m]arine insurance contracts are governed by federal admiralty law when there is an established federal rule, and by state law when there is not." Ingersoll Milling Machine Co. v. M/V Bodena, 829 F.2d 293, 305 (2d Cir. 1987).

When a federal court sitting in admiralty jurisdiction applies state law, it uses federal choice of law rules to determine which forum's law to apply. See Sundance Cruises Corp., 7 F.3d at 1080; State Trading Corp. of India v. Assuranceforeningen Skuld, 921 F.2d 409, 414 (2d Cir. 1990); Royal Ins. Co. of America v. Sportswear Group, LLC, 85 F. Supp.2d 275, 278 (S.D.N.Y. 2000). Generally, the court determines which state's law to use by "ascertaining and valuing points of contact between the transaction [giving rise to the cause of action] and the states or governments whose competing laws are involved." Advani, 140 F.3d at 162 (quoting Lauritzen v. Larsen, 345 U.S. 571, 582 (1953)); see also State Trading Corp. of India, 921 F.2d at 417. The Court of Appeals for the Second Circuit has instructed that "this choice-of-law analysis should include an assessment of the following contacts: (1) any choice-of-law provision contained in the contract; (2) the place where the contract was negotiated, issued, and signed; (3) the place of

performance; (4) the location of the subject matter of the contract; and (5) the domicile, residence, nationality, place of incorporation, and place of business of the parties." Advani, 140 F.3d at 162; accord Royal Ins. Co., 85 F. Supp.2d at 278.

With respect to the first factor, the presence of a choice of law provision, the Complaint asserts that the policies specify New York law applies and the defendants do not dispute this. (Compl. ¶13, 19, 26; Notice of Motion to Dismiss Complaint, Ex. B.) The second factor, place of contracting, is unclear from the Complaint. The third factor, place of performance, is also unclear although Lloyd's agreed that if it failed to pay under the policies, any claimants under the policies could sue in any court in the United States and a New York law firm was authorized to accept service for Lloyd's. (Notice of Motion to Dismiss Complaint, Ex. B at LU000115.) The fourth factor, location of subject matter, is indeterminate because the subject of the contract is marine cargo that travels throughout the world. The fifth factor, place of incorporation and place of business of the parties, varies. The Complaint alleges that the Lloyd's Underwriters are citizens of the United Kingdom and a variety of other jurisdictions. (Compl. ¶6.) NASL is a New York corporation with its principal place of business in New York. (Compl. ¶7.) Joy-Lud is a New York corporation with its principal place of business in New York. (Compl. ¶9.) The other financiers are citizens of Ireland, Austria, and New England. (Compl. ¶¶8, 10, 11.) The plaintiff asserts without contradiction that all parties conduct business in New York. (Compl. ¶13.)

There is a presumption that "when a maritime contract contains a choice-of-law clause, the law chosen by the parties governs. . . ." Farrell Lines Inc. v. Columbus Cello-Poly Corp., 32 F. Supp.2d 118, 127 (S.D.N.Y. 1997). For admiralty cases, the Supreme Court has noted that "[e]xcept as forbidden by some public policy, the tendency of the law is to apply in contract matters the law which the parties intended to apply." Lauritzen, 345 U.S. at 588-89. The exception is if "(1) that jurisdiction has no substantial relationship to the parties or the transaction or (2) that jurisdiction's law conflicts with the fundamental purposes of maritime law. . . ." Farrell Lines, 32 F. Supp.2d at 127 (quoting Perzy v. Intercargo Corp., 827 F. Supp. 1365, 1370 (D. Ill. 1993)). While England has significant contacts to this case, New York also has a substantial relationship to the parties and transaction at issue. Two of the parties are from New York, all parties conduct business in New York, and Lloyd's has agreed to accept service of process in New York. All parties have agreed to the application of New York law, and New York law, which follows federal maritime law, cannot be said to conflict with the fundamental purposes of maritime law. Thus, for issues in this case where there is no federal admiralty rule on point, New York law governs.

B.

The plaintiff argues that if this Court finds the policies are void because NASL violated its duty of utmost good faith, it has no obligation to the Financiers. The plaintiff argues that the Endorsement provisions assume that the policy has been validly formed and that if NASL violated its duty and there is no policy to begin with, the Endorsement provisions are

meaningless. The Financiers counter that the Endorsements are additional agreements that exist independent of the initial policy and protect the Financiers from recission due to misrepresentations by NASL.

As with other contracts, courts should interpret insurance policies to give effect to the intent of the parties as expressed in the clear language of the contract. See Andy Warhol Found. for the Visual Arts, Inc. v. Federal Ins. Co., 189 F.3d 208, 215 (2d Cir. 1999); Goldberger v. Paul Revere Life Ins. Co., 165 F.3d 180, 182 (2d Cir. 1999). Any ambiguities are to be read against the insurer. See Andy Warhol Found. for the Visual Arts, Inc., 189 F.2d at 215; Goldberger, 165 F.3d at 182; Reed v. Federal Ins. Co., 523 N.E.2d 480, 483 (N.Y. 1988). It is clear from the language of the Endorsements that they are separate contracts and shield the Financiers from the wrongdoing of the insured. The Endorsements expressly state that they are "agreements" and refer to themselves as distinct from the underlying policies: "[t]his agreement shall not extend the said policy to cover any additional risks." (Notice of Motion to Dismiss Complaint, Ex. B at LU000110.) Furthermore, the Endorsements specifically provide: "[t]his insurance, as to the interest of the financier shall not be impaired nor invalidated by any act or neglect of the named insured nor by failure to comply with any warranty or condition over which the Financier has no control. . . ." There is no textual support for the plaintiff's argument that this provision assumes a valid policy was formed. The plaintiff has also not alleged that the Financiers knew of or had any control over any misrepresentations NASL might have made to Lloyd's.

This provision would be meaningless if it were construed as the plaintiff would read it. If the plaintiff could void the Financiers' Endorsements and refuse to pay them because NASL allegedly breached its obligation to Lloyd's, the explicit protection for the Financiers against such an event would be completely without effect. Provisions in contracts should not be read in such a way as to make them meaningless. See, e.g., Mazaferro v. RLI Ins. Co., 50 F.3d 137, 140 (2d Cir. 1995); Jefferson Ins. Co. v. Travelers Indemnity Co., 703 N.E.2d 1221, 1225 (N.Y. 1998).

The situation of the Financiers in this case is similar to the situation of innocent mortgagees under New York law where the mortgagees are named insureds under an insurance policy obtained by the mortgagor. In New York, it is well established that if a mortgagee is explicitly covered in the mortgagor's insurance policy, the mortgagee has an independent contract with the insurer. See United States v. Commercial Union Ins. Co., 821 F.2d 164, 166 (2d Cir. 1987) (citing cases from New York and various other jurisdictions); Reed, 523 N.E.2d at 484; Syracuse Savings Bank v. Yorkshire Ins. Co., 94 N.E.2d 73, 75-77 (N.Y. 1950); Rubenstein v. Cosmopolitan Mut. Ins. Co., 403 N.Y.S.2d 96, 98 (App. Div. 1978); Citibank v. Covenant Ins. Co., 567 N.Y.S.2d 983, 986 (Sup. Ct. 1991). Even if the mortgagor's policy is later found to be void, the insurer's obligation to the mortgagee is not affected. See, e.g., Goldstein v. National Liberty Ins. Co., 175 N.E. 359, 360-61 (N.Y. 1931) (holding that policy that was void ab initio as to owner is still valid as to mortgagee under standard mortgagee clause); Vega v. North River Ins. Co., 410 N.Y.S.2d 813, 813 (App. Div. 1978) ("The mortgagee clause in the policy clause created

an independent contract between the insurer and mortgagee, which is not subject to defenses defendant-respondent may have against plaintiff owner.") (citations omitted); Rosen v. Colonial Coop. Ins. Co., 274 N.Y.S.2d 67, 70 (Sup. Ct. 1966) ("A standard policy of fire insurance may be void as to the owner because of his breach, yet, under the standard mortgagee clause be valid as to the mortgagee."). The standard mortgagee clause is similar to the Endorsements at issue in this case, usually providing "this insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property. . . ." Rosen, 274 N.Y.S.2d at 70. The mortgagee clause and the Financiers' Endorsements are no different. In the absence of any allegations of wrongdoing by the Financiers, the conduct of NASL does not affect their Endorsements.

The plaintiff's reliance on First Fin. Ins. Co. v. Allstate Interior Demolition Corp., 14 F. Supp.2d 302 (S.D.N.Y. 1998) for the proposition that under New York law recission of the initial insurance policy terminates the rights of additional insureds is unpersuasive. That decision was overruled by the Second Circuit Court of Appeals because it was a sua sponte summary judgment without notice to the parties. See First Fin. Ins. Co. v. Allstate Interior Demolition Corp., 193 F.3d 109 (2d Cir. 1999). Moreover, First Financial did not address the New York cases dealing with the rights of innocent additional insureds. The only New York case cited held only that a party in default may not prevent a recission through subsequent acts remedying the breach. First Fin. Ins. Co., 14 F. Supp.2d at 307 (citing Callanan v. Powers, 92 N.E. 747 (N.Y. 1910)).

The plaintiff attempts to analogize this case to one in which an innocent director is denied the benefits of a directors and officers ("D &O") liability policy because the corporation that obtained the policy had submitted materially false information to the insurance company. See American Inter. Specialty Lines Ins. Co. v. Towers Fin. Corp., No. 94 Civ. 2727, 1997 WL 906427 (S.D.N.Y. Sept. 12, 1997) The analogy fails, however, because the plaintiff does not point to cases in which there was a separate agreement with the innocent director. Indeed, in the American Inter. Specialty Lines Ins. Co. case relied on by the plaintiff, the Court was quite clear that the result would have been coverage for the innocent director had the contract contained a proper severability provision: "The case law makes clear that [the innocent director] could have protected himself by requiring the policy to include a severability clause, so that a misrepresentation by [the corporate wrongdoer] would result only in recission of the D & O insurance policy as to [the corporate wrongdoer]." Id. at *10. In this case, the Financiers did protect themselves by obtaining an explicit provision stating that their insurance would not be impaired or invalidated by any act or neglect of NASL or any failure to comply with any warranty or condition over which the Financiers had no control.

Finally, the plaintiff's assertion that the Financiers are not protected from recission unless there is an additional clause in the agreement stating that concealment by the original insured is not imputable to the additional insured is incorrect. The case that the plaintiff cites, In re Payroll Express Corp., 186 F.3d 196, 209 (2d Cir. 1999), holds only that a specific clause is needed to protect the insured from recission of his policy because of misrepresentations by the insured's agent.

In this case, it is not alleged that NASL was the agent for the Financiers. Rather, they had independent endorsements that specifically protected them against the possibility of wrongdoing by NASL.

Because under New York law the Financiers Endorsements are independent contracts with Lloyd's that would not be affected even if NASL's contract with Lloyd's is void, the motion to dismiss is granted with respect to all counts for the defendants F.J. Elsner, Bowman, and Joy-Lud.[3] No wrongdoing by any of the Financiers has been alleged. It is not possible on the present papers, however, to decide that the plaintiff could prove no wrongdoing by the Financiers. Therefore, the dismissal of the claim against the Financiers is without prejudice.

V.

The defendants contend that the Complaint does not meet the requirements of Fed. R. Civ. P. 10(b), which provides: "Each claim founded upon a separate transaction or occurrence . . . shall be stated in a separate count . . . whenever a separation facilitates the clear presentation of the matters set forth." The plaintiff has met this requirement by alleging two separate claims in two separate causes of

3. The result would be the same even if the law of England, the only other jurisdiction with an arguable interest in this case, were applied. See Transamerica Leasing, Inc. v. Institute of London Underwriters, 7 F. Supp.2d 1340, 1346 (D. Fla. 1998) (applying English law and concluding that an innocent co-insured's interest in a marine insurance policy was severable and the policy could only be voided under the doctrine of utmost good faith as to the non-disclosing party.).

action, each of which presents a clear claim for recission of the policies. Moreover, the failure to comply with Fed. R. Civ. P. 10(b) would not be a basis to dismiss the Complaint. See Bartholet v. Reishauer A.G., 953 F.2d 1073, 1078 (7th Cir. 1992) ("Although it is common to draft complaints with multiple counts . . . nothing in the Rules of Civil Procedure requires this."); Lahey v. JM Mortgage Serv., Inc., No. 99 Civ. 4074, 2000 WL 420851, at *2 n.3 (D. Ill. April 18, 2000); Stull v. Greene, No. 69 Civ. 440, 1971 WL 259, at *6 (S.D.N.Y. April 20, 1971).

VI.

Finally, the defendants argue that certain facts should be stricken from the Complaint under Fed. R. Civ. P. 12(f), which permits a court to strike "redundant, immaterial, impertinent, or scandalous matter." Specifically, they maintain that paragraphs 3, 27, 28, and 29 are irrelevant and prejudicial and should be stricken from the Complaint.

Motions to strike are disfavored and will not be granted "unless it is clear that the allegations in question can have no possible bearing on the subject matter." See Forschner Group, Inc. v. B-line A.G., 943 F. Supp. 287, 291 (S.D.N.Y. 1996) (internal quotation omitted). The Federal Rules of Civil Procedure evidence a strong preference that parties have an opportunity to develop their arguments. See SEC v. Lorin, 869 F. Supp. 1117, 1120 (S.D.N.Y. 1994). Thus, "ordinarily neither a district court nor an appellate court should strike a portion of the complaint on the grounds that the material could not possibly be relevant on the sterile field of the pleadings alone." Lipsky v. Commonwealth United Corp., 551 F.2d 887, 893 (2d Cir. 1976).

There is no basis to conclude that the facts in the disputed paragraphs cannot be relevant. The alleged facts deal with the claim of the Financiers that prompted the plaintiff's investigation into NASL. As such, they provide background context for the events at issue in this case and should not be stricken. See, e.g., Forschner Group, Inc., 943 F. Supp. at 292 (denying motion to strike background information).[4]

Conclusion

For the reasons explained above:

1. NASL's motion to dismiss is denied in its entirety.

2. The motion by F.J. Elsner, Bowman, and Jay-Lud to dismiss is granted and the plaintiff's claims are dismissed without prejudice to repleading with respect to those defendants.

3. The plaintiff should serve and file any Second Amended Complaint consistent with this Opinion within twenty-one (21) days of the receipt of this Opinion. Any named defendants should move or answer within twenty-one (21) days of the receipt of the Second Amended Complaint.[5]

So Ordered.

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4. In its motion, NASL asked for a stay of discovery during the pendency of this motion. The motion is now denied as moot.

5. The Court has considered all of the arguments raised by the parties. To the extent not expressly dealt with in this opinion, the arguments are either without merit or moot.